

This Opinion is Not a
Precedent of the TTAB

Mailed: April 29, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Doc Popcorn, LLC
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Serial No. 88151165
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Todd E. Stockwell of Stockwell & Smedley, PSC,
for Doc Popcorn, LLC.

Mark Shiner, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

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Before Kuhlke, Lykos and Coggins,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Doc Popcorn, LLC (“Applicant”) seeks registration on the Principal Register under Section 2(f), 15 U.S.C. § 1052(f), for the proposed mark DENVER MIX in standard characters for “popcorn,” in International Class 30.¹

The Trademark Examining Attorney has refused registration of Applicant’s proposed mark under (i) Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§ 1051,

¹ Application Serial No. 88151165 filed on October 11, 2018, based on an allegation of first use and first use in commerce on August 1, 2014, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

1052, 1127, on the basis that the proposed mark is generic; and (ii) in the alternative, Section 2(e)(1), 15 U.S.C. § 2(e)(1), on the basis that the proposed mark is merely descriptive of Applicant's services and Applicant's showing of acquired distinctiveness under Section 2(f) is insufficient.

I. Background

Initially the Examining Attorney refused registration under Section 2(e)(1) based on mere descriptiveness and Section 2(e)(2), 15 U.S.C. § 1052(e)(2), based on primary geographic descriptiveness. In the first Final Office Action the Examining Attorney withdrew the Section 2(e)(2) refusal but maintained the mere descriptiveness refusal. Applicant requested reconsideration arguing DENVER MIX has acquired distinctiveness and requesting registration under Section 2(f). The Examining Attorney then issued a Nonfinal Office Action, refusing registration under Sections 1, 2, and 45 based on genericness, maintaining the mere descriptiveness refusal and finding the evidence of acquired distinctiveness insufficient. After the second Final Office Action, Applicant twice requested reconsideration and filed a notice of appeal on October 22, 2020. On November 12, 2020, the Examining Attorney denied the last request; the appeal was subsequently resumed and briefs have been filed. We affirm the refusals.²

² Citations to TTABVUE throughout the decision are to the Board's public online database that contains the appeal file, available on the USPTO website, www.USPTO.gov. The first number represents the docket number in the TTABVUE electronic case file and the second represents the page number(s).

Citations to the examination record refer to the USPTO's online Trademark Status and Document Retrieval system (TSDR).

II. Is the Term DENVER MIX Generic for Popcorn?

“A generic term ‘is the common descriptive name of a class of goods or services.’ [citation omitted]. A generic mark, being the ‘ultimate in descriptiveness,’ cannot acquire distinctiveness.” *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986)); *see also USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2020 USPQ2d 10729, *1 (2020). Whether a proposed mark is generic rests on its primary significance to the relevant public. *In re Am. Fertility Soc’y*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991). Making this determination “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *Marvin Ginn*, 228 USPQ at 530; *see also Royal Crown*, 127 USPQ2d at 1046. “[A] term can be generic for a genus of goods or services if the relevant public . . . understands the term to refer to a key aspect of that genus.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1637 (Fed. Cir. 2016).

Based on the identification which contains no restrictions as to trade channels or end users, the relevant public is the purchasing or consuming public and entities for the identified goods, which the evidence discussed below reflects is the general public. *See Magic Wand*, 19 USPQ2d at 1553.

A. Genus of Goods

Because the identification of goods or services in an application defines the scope of rights that will be accorded the owner of any resulting registration under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), generally “a proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.” *Cordua Rests.*, 118 USPQ2d at 1636 (quoting *Magic Wand*, 19 USPQ2d at 1552). In this case, the identification appropriately expresses the genus of goods at issue. Thus, the ultimate inquiry is whether the relevant public understands DENVER MIX to refer to “popcorn.”

B. Does the Relevant Public Understand the Designation Primarily Refers to the Genus?

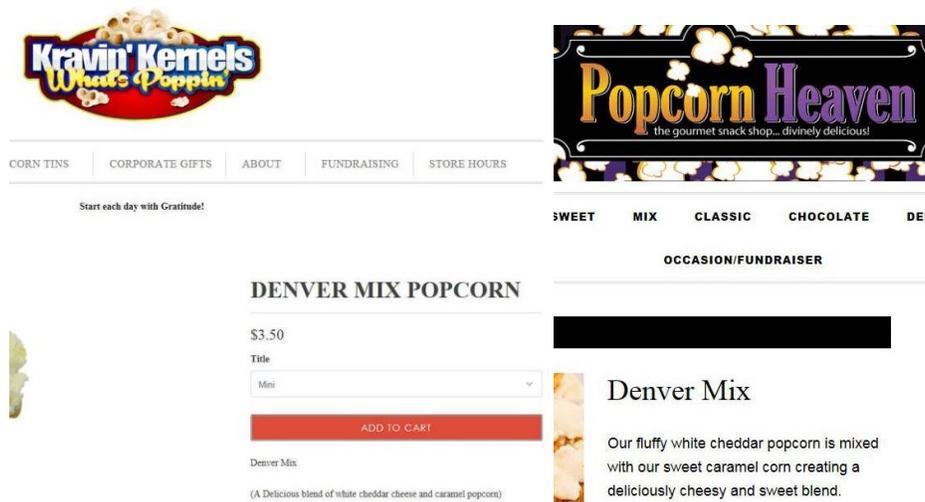
In assessing whether the relevant public understands the term primarily to refer to the genus, “[e]vidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); *see also Cordua Rests.*, 118 USPQ2d at 1634. In some cases, dictionary definitions and an applicant’s own recitation of goods may suffice to show genericness. *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987); *see also Am. Fertility Soc’y*, 51 USPQ2d at 1836.

The Examining Attorney explains the record shows that DENVER MIX identifies a particular flavor combination. Specifically he argues:

As applied to popcorn, the evidence of record shows that the wording “DENVER MIX” identifies a particular flavor combination as understood by the relevant public. The word “mix” means a combination of two or more things. See Oxford Dictionary definition of “mix,” attached to January 23, 2019 First Office Action (“Jan 2019 Office Action”) at TSDR 48-52 (“Two or more different qualities, things, or people placed, combined or considered together.”). In the context of popcorn, the term mix refers to the combination of two popcorn types or flavors. In relation to popcorn, the evidence shows that the wording “Denver” when used alone or together with “mix” means the combination of white cheddar cheese popcorn and caramel popcorn. The record is replete with evidence of third-party use of “Denver mix” or “Denver” to identify popcorn consisting of a combination of caramel popcorn and white cheddar popcorn.

8 TTABVUE 6-7.

The Examining Attorney submitted 25 examples of third-parties using the term DENVER MIX and 13 using the term DENVER by itself to refer to a key aspect of the popcorn, specifically the flavor mixture of caramel and white cheddar. A few representative examples are set forth below:³



³ January 23, 2019 Office Action TSDR at 17, 19, 22, 35, 39; July 23, 2019 Office Action TSDR at 2, 14, 17; November 12, 2020 Reconsideration Letter TSDR at 2, 3.



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DENVER MIX (WHITE CHEDDAR & CARAMEL)



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Product Categories

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Caramel (8)



Denver Mix

\$2.90 - \$19.75

Similar to Chicago, but the Colorado version! Denver Mix is Caramel mixed with White Cheddar. Delicious and elegant at weddings, showers, and other parties.



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PoppedCorn, LLC

Denver Mix (White Cheddar & Caramel)



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Blend of white cheddar popcorn and golden buttery caramel popcorn, perfect mix of savory and sweet.

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This mix will take you a mile high and then some! Denver's Finest White Cheddar Popcorn Mixed with Our Extra Buttery Caramel Popcorn!



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Popcorn Joy Box

Sampler Packs

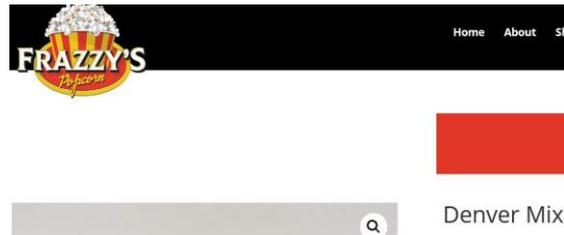
Home > Products > Shop & Ship 4-Pack Sampler



Shop & Ship 4-Pack Sampler

\$18.00

- Flavor #1* Denver Mix (White Cheddar & Caramel)
- Flavor #2* Cheddar Cheese
- Flavor #3* Kettle Corn
- Flavor #4* White Chocolate



Applicant's specimen of use also describes DENVER MIX as a cheddar/caramel flavor: "Snowy white kernels of Triple White Cheddar slaloming down Rocky Mountains of Caramel Bliss, creating an incredible flavor sensation."⁴ See *In re Reed Elsevier Props.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (appropriate to consider the applicant's website to provide context for and inform the understanding of the identification); *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420 (Fed. Cir. 2005) (examining the subject website in order to understand the meaning of terms).

Applicant does not address all of this evidence of record, but instead simply focuses its argument on evidence "in the most recent Office Action of five (5) Google search results on the first page for Applicant's mark as a popcorn flavor" and states that these five results are not sufficient to prove the proposed mark is generic. 6 TTABVUE 10. In addition, Applicant points to its search results for "Denver Mix" without the context of the goods in the search strategy. Applicant argues:

Applicant performed a Google search of the term "Denver Mix". Reviewing the first forty-eight (48) results on the first five (5) pages of results, Applicant notes that only four (4) of the results are for popcorn products (and Applicant's own use of the trademark is the first of these results to

⁴ October 11, 2018 Application Specimen of Use TSDR at 1.

appear). ... While other examples of the use of Applicant's mark by third parties may exist, Applicant does not believe that such use could rise to the level of being considered generic without having more prominence and widespread usage on the world's most widely used internet search engine. Although the Examining Attorney stated that Google search results can vary, and depend on factors such as location of the IP address, Applicant notes that it reviewed five (5) pages encompassing forty-eight (48) results.

6 TTABVUE 10.

These search results are not particularly probative because the determination of whether a mark is merely descriptive or generic is made in relation to the goods and not in the abstract. *See DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). The fact that DENVER MIX may appear in connection with radio stations and other contexts does not minimize the public's understanding of DENVER MIX as a popcorn flavor in the context of the relevant goods. Nonetheless, there are several examples of third-parties using DENVER MIX as a popcorn flavor in these results.

The evidence shows DENVER MIX is the name of a key aspect of popcorn, specifically, the flavor of the popcorn. *See Cordua Rests.*, 118 USPQ2d at 1637 (CHURRASCOS a type of grilled meat generic for restaurant services); *A. J. Canfield Co. v. Honickman*, 808 F.2d 291, 1 USPQ2d 1364 (3d Cir. 1986) (CHOCOLATE FUDGE generic for chocolate fudge flavored diet soda). In addition to the several examples of generic usage of the entire proposed mark DENVER MIX, the words taken separately lead to the same conclusion. *See Princeton Vanguard LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1832-33 (Fed. Cir. 2015) (it is

“useful to consider the public’s understanding of the individual words.”). MIX means two or more different things combined together.⁵ In connection with popcorn, DENVER is used by itself or with the word STYLE to indicate a particular flavor.⁶ The combination does not result in a different meaning.

We find the relevant consuming public would understand DENVER MIX to name a key aspect of the goods, thus Applicant’s proposed mark is generic for popcorn. *Royal Crown*, 127 USPQ2d at 1045; *Cordua Rests.*, 118 USPQ2d at 1637. We therefore find that Applicant’s proposed mark is incapable of indicating source.

III. Has the Term DENVER MIX Acquired Distinctiveness?

For completeness we address the alternative refusal based on mere descriptiveness and lack of acquired distinctiveness.

C. Mere Descriptiveness

By claiming acquired distinctiveness under Section 2(f), Applicant has conceded that the matter sought to be registered is merely descriptive of the identified goods. *In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, at *9 (TTAB 2019) (citing *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009)); *see also Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988); *In re Am. Furniture Warehouse*

⁵ January 23, 2019 Office Action TSDR at 48-50 (OXFORD LIVING DICTIONARIES (oxforddictionaries.com)).

⁶ *See, e.g.*, January 23, 2019 Office Action TSDR at 34 (“Denver” www.uptownpopcorn.com), 37 (“Denver” popcorngirlvegas.com); July 23, 2019 Office Action TSDR at 5 (“Denver Style” www.gourmetpopcornking.com); October 14, 2019 Office Action at 2 (“Denver” www.amanapopcorncompany.com), 17 (“Denver” www.papabearpopcorn.com).

Co., 126 USPQ2d 1400, 1403 (TTAB 2018) (noting that a claim of acquired distinctiveness by applicant to overcome a refusal in a prior registration for the same wording in connection with same services “can be viewed as a concession by Applicant that the wording itself is not inherently distinctive for those services”).

Even though Applicant has conceded DENVER MIX is merely descriptive, we must address the degree of descriptiveness because that bears on the quantity and quality of evidence required to prove acquired distinctiveness, which we discuss below. *Royal Crown*, 127 USPQ2d 1045. We find the proposed mark highly descriptive based on the entire record and for the reasons set out in the genericness discussion above.

D. Acquired Distinctiveness

Because we have found the proposed mark highly descriptive, Applicant’s burden of establishing acquired distinctiveness under Section 2(f) is “commensurately high.” *Virtual Independent Paralegals*, 2019 USPQ2d 111512, at *11 (TTAB 2019) (citing cases). *See also, e.g., Royal Crown*, 127 USPQ2d at 1048 (“[H]igher levels of descriptiveness require a more substantial showing of acquired distinctiveness.”); *Steelbuilding.com*, 75 USPQ2d at 1424 (“[A]pplicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.”); *In re Bongrain Int’l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1727 n.4 (Fed. Cir. 1990) (quoting *Yamaha Int’l v. Hoshino Gakki Co.*, 6 USPQ2d at 1008 (“the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning”)); *In re Tires*,

Tires, Tires Inc., 94 USPQ2d 1153, 1157 (TTAB 2009) (highly descriptive terms are less likely to be perceived as trademarks, and therefore more persuasive evidence of secondary meaning will ordinarily be required to establish their distinctiveness).

To establish that a term has acquired distinctiveness, “an applicant must show that in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.” *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012)). To meet this burden, an applicant may offer three basic types of evidence:

1. A claim of ownership of one or more active prior registrations on the Principal Register of the same mark for goods or services that are sufficiently similar to those identified in the pending application. Trademark Rule 2.41(a)(1), 37 C.F.R. § 2.41(a)(1).
2. A verified statement that the mark has become distinctive of the applicant’s goods or services by reason of the applicant’s substantially exclusive and continuous use of the mark in commerce for five years before the date on which the claim of distinctiveness is made. Trademark Rule 2.41(a)(2), 37 C.F.R. § 2.41(a)(2).
3. Other appropriate evidence of acquired distinctiveness. Trademark Rule 2.41(a)(3), 37 C.F.R. § 2.41(a)(3).

The applicant may submit one or any combination of these types of evidence. Depending on the nature of the mark and the facts in the record, the examining attorney may determine that a claim of ownership of a prior registration(s) or a claim of five years’ substantially exclusive and continuous use in commerce is insufficient

to establish a prima facie case of acquired distinctiveness. In which case, the applicant may then submit additional other evidence of acquired distinctiveness.

Our ultimate Section 2(f) analysis of acquired distinctiveness and determination in this case is based on all of the evidence considered as a whole. Considerations that may be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the [mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark. *In re Snowizard, Inc.*, 129 USPQ2d 1001, 1005 (TTAB 2018) (quoting *Converse, Inc. v. Int'l Trade Comm'n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)). “All six factors are to be weighed together in determining the existence of secondary meaning.” *Converse*, 128 USPQ2d at 1546 .

Applicant relies on the following in support of its Section 2(f) claim:

- Applicant has used DENVER MIX in connection with popcorn for over six years;⁷
- Applicant spends over \$6500 annually on marketing related to the DENVER MIX products;⁸

⁷ Stever Heisner, Applicant's Vice President of Administration, Supplemental Declaration September 30, 2019 Request for Reconsideration TSDR at 5-6; Heisner Supplemental Declaration, April 2, 2020 Response TSDR at 7-8.

⁸ Heisner Supplemental Declaration, September 3, 2020 Request for Reconsideration TSDR at 17-18.

- From 2014 to 2019 annual sales of Applicant’s DENVER MIX popcorn have increased from \$110,000 to \$220,000 demonstrating that more customers have purchased these goods allegedly showing increasing public recognition;⁹ and
- Declarations from seven customers and one franchisee attesting that Applicant “is the owner of the mark sought to be registered” no others have “the right to use said mark in commerce” and they recognize DENVER MIX “is owned by the Applicant.”¹⁰

Applicant did not offer details about the market context of its advertising and sales figures. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016) (probative value of sales revenue figures quantified as doses sold is diminished by the fact that the amount is just a raw number without context as to applicant’s market share or whether this amount is significant in the industry). There is no information as to the market share these sales figures represent or the extent and depth of consumer exposure other than the raw sales and advertising data.

Further, given the highly descriptive nature of the proposed mark, six years is not particularly long. Applicant’s assertion that “substantially exclusive” does not mean no other use by third parties is correct in that inconsequential or infringing use may not preclude a showing of “substantially exclusive” use. *See L.D. Kichler Co. v. Daviol Inc.*, 192 F.3d 1349, 52 USPQ2d 1307, 1309 (Fed. Cir. 1999). This record, however, does not reveal “inconsequential” or “infringing” third-party use. In fact, it contains

⁹ *Id.*

¹⁰ Customer and Franchisee Declarations, October 22, 2020 Request for Reconsideration TSDR 6-21.

sufficient examples of third parties using DENVER MIX as a flavor name to support a finding of genericness.

The form declarations from six customers and one franchisee, represent an infinitesimally small portion of potential consumers of popcorn. *See In re Benetton Grp., S.p.A.*, 48 USPQ2d 1214, 1217 (TTAB 1998) (“given the nature of applicant’s services, the statements of twenty three individuals do not establish an association of the [mark] with a single source by other than an extremely small number of the purchasing public.”). All seven are identical in substance, having been written on preprinted forms with space saved for the declarant to add his or her location of residence, signature, printed name and date. Form declarations such as these may not “actually reflect the views of the declarants” and are entitled to “little weight.” *In re EBSCO Indus. Inc.*, 41 USPQ2d 1913, 1917 (TTAB 1996); *see also In re Pohl-Boskamp GmbH & Co.*, 106 USPQ2d 1042, 1051 (TTAB 2013) (“probative weight ... [of declarations] is affected somewhat by the fact that they are all essentially identical in form and were clearly not composed individually. ... [S]uch statements are less persuasive than statements expressed in the declarants’ own words.”). Moreover, the franchisee is not an objective observer. *See In re Pennzoil Prods. Co.*, 20 USPQ2d 1753, 1758 (TTAB 1991) (form declarations from nine marketers of oil products who have business relationships with the applicant “lack persuasiveness on the issue of the primary significance of the [proposed mark] to the purchasing public.”). The probative value of these declarations is extremely limited. *See generally In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1633 (Fed. Cir. 2003) (Where multiple

affidavits are “nearly identical,” “conclusorily worded,” “represent the views of a small segment of the relevant market,” “they are not the kind of ‘competent evidence’ that could carry Pacer’s burden of rebutting the PTO’s prima facie case.”).

Given the highly descriptive nature of Applicant’s proposed mark, this record does not support a finding of acquired distinctiveness. *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at *10 (TTAB 2020) (“The record in this case reflects that, notwithstanding Applicant’s substantial efforts, the public, including Applicant’s competitors, still primarily use and understand the term ‘guaranteed rate’ to describe a feature of mortgage lending services.”)

Decision: We affirm the refusal to register Applicant’s proposed mark on the ground that it is a generic designation of the identified goods, and in the alternative, we affirm the refusal to register on the ground that the mark is merely descriptive and without acquired distinctiveness.